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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 926

DAVID FALZONE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, David Falzone, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINIONS OF THE COURT BELOW.

The judgment of the United States District Court for the Southern District of Illinois, Northern Division, was entered on June 26, 1962. It is not reported but appears in the certified, printed, joint appendix filed herewith.

The original opinion of the United States Court of Appeals for the Seventh Circuit, filed April 22, 1964, was not published and is set forth in the appendix to this petition.

The contrary opinion of the United States Court of Appeals for the Seventh Circuit, sitting *en banc*, on a rehearing filed December 22, 1964, was not published and is set forth in the appendix to this petition.

JURISDICTION.

The order of the United States Court of Appeals, affirming the judgment and sentence of the United States District Court for the Southern District of Illinois, Northern Division, was filed December 22 1964. The petition for rehearing was denied on January 21, 1965. This petition is seasonably filed under Rule 22 of this court.

Jurisdiction in this court to review the judgment below is provided in 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Was it not a denial of the petitioner's right to trial by jury for the trial judge to instruct the jury at the close of the Government's evidence in chief that the Government had shown to the satisfaction of the court that a connection existed between numerous acts and declarations of co-defendants and this petitioner, and, hence, were admissible against him even though he was absent during these actions and declarations.

2. Did not the Government resort to an aggregate of misconduct contrary to the minimal standards of fair play in asking of an important defense witness the irrelevant but destructive question of whether he recalled killing his stepmother; and in eliciting from its principal accomplice

witness that he was leaving the country after the trial because he had a price on his head; and in the efforts of one of the assistant district attorneys and an agent of the Federal Bureau of Investigation to frighten this petitioner from testifying in his own behalf?

CONSTITUTIONAL PROVISIONS INVOLVED.

Constitution of the United States:

Article III, Section 2:

"... The Trial of all Crimes, except in Cases of Impeachment shall be by Jury;"

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall be been committed. ..."

STATUTES INVOLVED.

Title 18 U. S. C. Section 371. Conspiracy to commit offense or to defraud United States:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18 U. S. C. Section 659. Interstate or Foreign Baggage express or freight.

"... Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both. . . ."

STATEMENT OF THE CASE.

The petitioner, David Falzone, was indicted, together with James Allegretti, Louis Darlak, Frank Lisciandrello and Joseph Lisciandrello, on June 30, 1960, under two counts, one, charging a conspiracy, contrary to Title 18, Section 371, United States Code, to possess whisky, valued in excess of $100.00, which had been stolen from an interstate shipment; and, two for possession of this whisky, contrary to Title 18, Section 659, United States Code.

All defendants (excepting Joseph Lisciandrello who was severed because of illness during the trial) were found guilty by a jury of both counts and on June 26, 1962, each was sentenced to serve five years imprisonment under the conspiracy charge and seven years imprisonment, to be concurrently served, under the possession charge. A three thousand dollars fine was also imposed on each of the defendants.

On April 22, 1964, the majority of a three judge division of the Court of Appeals reversed the judgment and sentence of the trial court and remanded the case for a new trial.

On December 22, 1964, six of the seven judges sitting *en banc* on a rehearing rejected the earlier majority opinion and adopted the minority opinion, affirming the judgment and sentences below.

On January 21, 1965, six of the seven judges sitting *en banc* denied the petitions for rehearing.

STATEMENT OF FACTS.

During the course of the trial of this case the Government presented 20 witnesses in chief who testified to many acts, declarations, and statements by one or more of the alleged coconspirators, including those of the Government's principal witness, Gerald Covelli, a self styled accomplice, to which this petitioner and all nonparticipating defendants objected. On each such occasion, the court reserved its ruling on the avowal of the prosecution to connect up this testimony.

At the close of the Government's evidence, the prosecution moved to admit all of the testimony as to these acts and declarations against all of the defendants.

Whereupon the court instructed the jury thusly:

> "Ladies and gentlemen, will you please give me your attention:
>
> "From time to time objections have been made by defendants to testimony as to acts, conversations, and statements, had or made by one or more of the defendants, but out of the presence of the other defendants Whenever such objections have been made, I have reserved my ruling thereon, upon the Government's avowal to connect up such testimony.
>
> "I now rule that the Government has sustained its avowed burden, and has shown to the satisfaction of the Court that a connection does exist between each such act, conversation and statement and the several defendants.
>
> "At this time, therefore, I overrule each objection as to which my ruling was reserved from time to time as such objections were made; and I now rule that the testimony relating to the acts, conversations and statements by the several defendants and in each such instance is admissible and admitted as evidence against all of the defendants whether or not each was present

when such acts were done, such conversations were had or such statements were made.

"I therefore instruct you that you may consider the testimony of the character above mentioned as evidence against such other defendants who were not then present, as well as against those defendants who are shown by the testimony to have been then present and participating in such arguments, statements, and conversations.

"Now, of course, this ruling is in regard only to the matters which the Court reserved from time to time."

The motions of all defendants for a mistrial on the ground that the court had invaded the province of the jury were denied (App. 296-298).

On the direct examination of Gerald Covelli the Government elicited from the witness that after the trial he was leaving the country because there was a price on his head. Whereupon the motions of all defendants for a mistrial were denied (App. 242-243).

During the Government's cross examination of Robert Westerhausen, the prosecution asked whether he recalled killing his stepmother. The motions of all defendants for a mistrial were denied (App. 356-357).

In the midst of the trial, one of the Assistant United States Attorneys conducting the trial and an agent of the Federal Bureau of Investigation called upon this petitioner at the motel where he was staying and told him he was a fool to take the stand in his defense and, if he did, they would murder him (App. 324-325, 339-340).

ARGUMENT.

The Court should grant the writ of certiorari in this case for two reasons:

First, the opinion below has decided an important question of federal law which has not been, but should be, settled by this court.

Second, the opinion below disregards the duty to supervise the administration of criminal justice in the federal courts.

1.

Where, as in this case, the Government indicts several persons as both coconspirators, under count one, and as members of a joint enterprise to possess property stolen from an interstate shipment, under the second count, it is a basic right of each defendant to have his case decided individually by the jury. *Constitution of the United States*, Article III, Section 2; Amendment VI.

Moreover, it is the jury's province to determine whether each defendant has been shown by credible evidence of his own conduct, only, to have been a member of the alleged conspiracy or a member of the joint enterprise before hearsay actions and utterances of his codefendants may be considered as evidence bearing on his guilt. *Carbo* v. *United States*, 9 Cir., 314 F. 2d 718, 735-737; *United States* v. *Dennis*, 2 Cir., 183 F. 2d 201, 230-231.

Yet, the trial judge, in this matter, at the close of the Government's case in Chief (App. 296-297), instructed the jury as a matter of law that sufficient independent, credible evidence of the membership of all the defendants in the conspiracy and joint enterprise had been shown.

The majority opinion of April 22, 1964, following its

precedent in *United States* v. *Pronger*, 7 Cir., 287 F. 2d 498, expressly held that the court's instruction was a clear invasion of the jury's function. The concurring opinion said of this instruction that it ". . . invited a substitution of the 'feeling of collective culpability for a finding of individual guilt'."

This petitioner urges that the instruction was more than an "invitation." It was, in effect, a pronouncement by the court that all the defendants were members of a conspiracy and a criminal joint enterprise in his judgment and that the jury, too, must so regard them.

Inasmuch as the Court of Appeals *en banc*, save one dissent, has now ruled that this does not constitute reversible error, it has decided an important question of everyday federal law which should be settled by this Court.

2.

After a key defense witness has testified to being told by the Government's chief witness that the defendants had nothing to do with the charges against them, but he had named them to save himself (App. 345-350), the prosecutor inquired into the witness' prior mental illness (which had exonerated him from a homicide charge arising out of his mother-in-law's death) thusly:

By Mr. Quan:

Q. You stated that your memory began to better about 1955, is that right?

A. Yes.

Q. Do you now recall killing your stepmother?

Motions by all for a mistrial were denied (App. 356-357).

The Government, also, elicited from its chief witness, that he was fleeing the country after trial because he had a

price on his head. Motions of all for a mistrial were denied (App. 242-243).

Finally, the efforts of one of the prosecutors and an agent of the Federal Bureau of Investigation to frighten this petitioner, during the trial, while at a motel and not in his lawyer's presence, from testifying in his own behalf was a wholly unworthy stratagem of incalculably unsettling affect on his later appearance and demeanor while on the stand (App. 324-325, 339-340).

The foregoing actions of the prosecution were a resort to unfair play "calculated to procure a wrongful conviction." *Berger* v. *United States*, 295 U. S. 78, 88; and, hence, it would appear that the duty to supervise the administration of criminal justice in the federal courts warrants, of itself, this court's exercise of its jurisdiction of this case. *McNabb* v. *United States*, 318 U. S. 332, 340.

CONCLUSION.

For the foregoing reasons, and those advanced by his copetitioners which may be applicable to him, David Falzone seeks the writ of certiorari.

Respectfully submitted,

DANIEL C. AHERN,
Atty. for David Falzone.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

Nos. 13915-18 SEPTEMBER TERM, 1963 APRIL SESSION, 1964

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 13915 *vs.*
JAMES ALLEGRETTI,
Defendant-Appellant.
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 13916 *vs.*
DAVID FALZONE,
Defendant-Appellant.
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 13917 *vs.*
FRANK LISCIANDRELLO,
Defendant-Appellant.
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 13918 *vs.*
LOUIS DARLAK,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Illinois, Northern Division.

April 22, 1964

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* James V. Allegretti, Louis A. Darlak, David Falzone and Frank Lisciandrello, defendants, have severally appealed from judgments on

the verdict of a jury and their sentences to imprisonment in pursuance thereof.

Defendants were tried on an indictment charging in count I that they and Joseph Lisciandrello and Gerald Covelli conspired to possess goods which they knew were stolen from an interstate shipment, in violation of 18 U. S. C. A. § 371. In Count II they were charged with possession of Old Sunnybrook whiskey stolen in interstate commerce, and known to have been stolen, in violation of 18 U. S. C. A. § § 2 and 659.

Although the indictment was returned in the district court for the Northern District of Illinois, Eastern Division, it was transferred to the district court for the Southern District of Illinois, Northern Division, for trial.

Defendant Joseph Lisciandrello, who suffered illness during the trial, was granted a mistrial.

The trial started on March 28, 1962. Ending on April 12, 1962, the jury heard the testimony of 20 government witnesses, as the court reserved its rulings upon repeated objections made by defense counsel to parts of the testimony, relating to acts, conversations and statements made by one or more of the defendants, out of the presence of the other defendants.

The district court, on April 12, 1962, spoke directly to the jury and said:

> "Ladies and gentlemen, will you please give me your attention:
>
> "From time to time objections have been made by defendants to testimony as to acts, conversations, and statements, had or made by one or more of the defendants, but out of the presence of the other defendants. Whenever such objections have been made, I have reserved my ruling thereon, upon the Government's avowal to connect up such testimony.

"I now rule that **the Government** has sustained its avowed burden, and **has shown to the satisfaction of the Court that a connection does exist between each such act, conversation and statement and the several defendants.** [Emphasis supplied].

"At this time, therefore, I overrule each objection as to which my ruling was reserved from time to time as such objections were made; and I now rule that the testimony relating to the acts, conversations and statements by the several defendants and in each such instance is admissible and admitted as evidence against all of the defendants whether or not each was present when such acts were done, such conversations were had or such statements were made.

"I therefore instruct you that you may consider the testimony of the character above mentioned as evidence against such other defendants who were not then present, as well as against those defendants who are shown by the testimony to have been then present and participating in such arguments, statements, and conversations.

"Now, of course, this ruling is in regard only to the matters which the Court reserved from time to time."

Thereupon all defense counsel joined in a motion for a mistrial, on the ground that the court had invaded the province of the jury. That motion was denied. Thereupon the government rested its case, and the evidence in defense was received.

1. It is undisputed that the government had the burden of submitting to the jury sufficient evidence showing beyond a reasonable doubt that the conspiracy charged in count I existed and that defendants were members thereof. The court accordingly instructed the jury as to its duty in this respect. He also defined the term "conspiracy", as set forth in 18 U. S. C. A. § 371. The court characterized a conspiracy as "a kind of 'partnership in criminal purposes' in which each member becomes the agent of every other member."

Faced with the duty of deciding whether a conspiracy had been proved by the evidence, the jury was aware that the court had told it that the government had "shown to the satisfaction of the Court that a *connection* does exist between each such act, conversation and statement and the several defendants." (Italics supplied.) It was for this reason that the court instructed the jury that it might consider certain evidence, which it had mentioned, against such other defendants who were not then present, as well as against those defendants who were present and participating in such statements and conversations.

Of course the court had the duty to make a ruling upon the objections in question. However, we know of no requirement that the court state to the jury its *reasons* therefor. We have no doubt that a statement by the court that the government had shown to the satisfaction of the court that a connection existed between such relevant evidence and the various defendants charged with conspiracy, undoubtedly had the effect of conveying to the jurors the court's belief that a conspiracy existed, which was the very question which the jury was required to ascertain. We are convinced that a jury would construe the word "connection", used by the court in its oral statement, as closely akin to a conspiracy, as characterized by the court in the foregoing instruction.

In *United States* v. *Pronger*, 287 F. 2d 498 (1961), where defendant Pronger had appealed from a judgment convicting him on the verdict of a jury on a two-count indictment involving the movement in interstate commerce of a stolen automobile, it was urged at the trial that there was a common scheme or plan between Pronger and a second defendant. The court instructed the jury that it should find whether or not there was any common design or common concert of action between the defendants with regard to

the charges made and that the jury should determine, from evidence, whether or not the defendants were guilty of the charges. In referring to certain remarks of the court, we said, at 500:

> "In a case such as this a defendant cannot be bound by the acts or declarations of another defendant until the common design or common concert of action between the two defendants and their participation have been established. *Glasser* v. *United States*, 315 U. S. 60, 74, 62 S. Ct. 457, 86 L. Ed. 680; *United States* v. *United States Gypsum Co.*, D. C., 67 F. Supp. 397, 451; *May* v. *United States*, 84 U. S. App. D. C. 223, 175 F. 2d 994, 1008.
>
> "Whether intentional or not, we believe that the court's remarks had the effect of telling the jury that the government had proved that the common design or common concert of action of Roberts and Pronger, as charged, had been proved. If they did not have that effect, they merely succeeded in confusing the jury. In either event, Pronger was deprived of a fair trial by jury. 'A conviction ought not to rest on an equivocal direction to the jury on a basic issue.' *Bollenbach* v. *United States*, 326 U. S. 607, 613, 66 S. Ct. 402, 405, 90 L. Ed. 350."

We reversed as to defendant Pronger and remanded for a new trial.

In the case at bar, in attempting to justify the statement by the district court that the government had shown to the court's satisfaction that a connection existed between the evidence to which the court referred and the various defendants, government counsel rely on *United States* v. *Bernard*, 287 F. 2d 715 (1961). However, at 720, it appears that the district court's statement to the jury not only was different from that used in the case at bar, but was properly limited so as not to convey to the jury the opinion of the court that a common plan or design had been shown to exist.

But the court did instruct that evidence, with certain exceptions, which when received was not to be considered against any defendant to whom the evidence did not pertain, could thereafter be considered as to all defendants if the jury found that there was a common plan or design proved.

We there held that the question of whether there was such a plan or design was properly submitted to the jury.

At no place in *Bernard* did it appear that the district court attempted to give any reason or explanation for its ruling, which was undoubtedly correct. The court simply announced to the jury its ruling admitting the evidence against all defendants, but left to the jury the question of deciding whether a common plan or design was proved beyond a reasonable doubt. We adhere to the opinion written by District Judge Mercer, who sat with us in deciding that case.

We are constrained to hold that, in the case at bar, the expression of the court's reasons did have the effect of suggesting to the jurors that the court believed that a conspiracy existed, and for that reason invaded the province of the jury. This requires a reversal of the judgments and sentences on count I.

2. In view of our holding in regard to count I, it becomes necessary to consider the verdict, judgments and sentences, insofar as they pertain to count II, which charges defendants with possession of whiskey stolen from a shipment in interstate commerce and known by them to have been stolen.

The court instructed the jury that each offense and the evidence applicable thereto should be considered separately. The jury was further instructed, specifically as to count II, that the essence of the offense there charged "is guilty

knowledge on the part of the accused that the goods were stolen". The jury was correctly told:

> "* * * The crime as alleged in Count II consists of possessing it knowing said goods to have been stolen, and you cannot find the defendant guilty of Count II of this indictment unless you believe beyond a reasonable doubt that such defendants knew the goods were stolen, but it is not necessary to warrant a conviction under Count II that the defendant knew the goods were stolen from an interstate shipment. They must indeed have been stolen from an interstate shipment of freight, but it is sufficient guilty knowledge if he knows they were stolen."

To us it is apparent that the government had the burden of proving that each of the four defendants on trial knew that the goods were stolen. The burden of proof beyond a reasonable doubt, of course, rested upon the government, but, as to count II, the government's case did not rely upon the existence of a conspiracy, as charged in count I. In this situation the difficult task placed upon the jury in its consideration of the evidence was to separate those parts which were admitted under the conspiracy count, from any evidence tending to prove the charge in count II.

Considering the length of the trial, the number of witnesses and the difficulties inherent in making this separation in their minds, it is our opinion that laymen jurors would have become so confused as to be unable to perform their function effectively. The error in the court's remarks to the jury could not practically have been confined in the juror's minds to count I when the jury was also considering the evidence insofar as applicable *only* to count II. Thus we are required to reverse the judgments and sentences on count II.

We find it appropriate to make these remarks, in view of the fact that we have contemplated the possibility of

affirming the convictions on the basis of the verdict on count II only.

3. In addition to the matters which we have already discussed, we deem it appropriate to state that there is sufficient evidence in the record to support the verdict as to each of the defendants. We reject defendants' contention to the contrary.

4. Defendants have also alleged and assigned as error the admission of irrelevant, incompetent and prejudicial evidence, improper limiting of cross-examination, misconduct of government counsel, a denial of defendants' rights under 18 U. S. C. A. § 3500, a failure of the district court to examine the grand jury minutes of the testimony of witness Olshon in the circumstances, and errors by the court in the giving, and failure to give, certain instructions.

Inasmuch as we shall direct a new trial of this case, it is unnecessary at this time to rule upon these alleged errors. There is no reason to believe that, if errors in these respects were in fact committed, they will be repeated upon another trial.

For all of these reasons, the judgments and sentences from which these appeals were taken are reversed and this case is remanded for a new trial.

REVERSED AND REMANDED.

Nos. 13915-18

CASTLE, *Circuit Judge*, specially concurring. I agree with Judge Schnackenberg's resolution of the issue he finds dispositive of the appeals. The concern so vigorously expressed by our brother, Judge Knoch, appears to overlook that *the merits of the jury system can be preserved and protected only by permitting it to operate without interference by the trial court.* Praise of the system does not serve to overcome the departure therefrom evidenced by the record before us. It is essential to the proper preservation and operation of the jury system that the court not invade the province reserved to the jury—either directly or indirectly. It is unfortunate that the error occurred. That my distinguished colleagues are so divided as to the consequences which must be assigned to it convinces me that the jurors—laymen untrained in the niceties of the law—who looked to the trial judge for guidance, can not be said to have been unimpressed by the court's remarks. And the court's statement that it was satisfied that a connection existed between the acts of the several defendants invited a substitution of the "feeling of collective culpability for a finding of individual guilt." Cf. *United States* v. *Bufalino*, 2 Cir., 285 F. 2d 408, 417.

Nos. 13915-18

KNOCH, *Circuit Judge* (dissenting): I cannot agree with the majority opinion and decision, and I therefore dissent. I am convinced that there is no substantial basis for reversal of these judgments as to count 1 of the indictment and no basis whatsoever for reversal of the judgments entered upon count 2 thereof.

A conspiracy trial inevitably presents the perplexing question as to the admissibility of evidence of acts and statements done or made by one or more of the defendants, but without the participation of all of the other defendants. The rule for the admission of such evidence against

defendants who were not present when the acts were done or the statements made involves a determination by the trial judge that, independently of the statements of others, there is evidence adduced that a conspiracy existed and that the party against whom the evidence is sought to be introduced was a party to the conspiracy. The court must also be satisfied that the act or statement was done or made while the conspiracy existed and that it was in furtherance of the conspiracy. *E.g. Krulewitch* v. *United States,* 336 U. S. 440 (1949); *Glasser* v. *United States,* 315 U. S. 60 (1942); *United States* v. *Konovsky,* 7 Cir. (1953), 202 F. 2d 721, 727; *Allen* v. *United States,* 7 Cir. (1924), 4 F. 2d 688, 694, rehearing den. (1925). The determination of such facts upon which admissibility depends is the province of the trial judge. *United States* v. *Dennis,* 2 Cir. (1950), 183 F. 2d 201, 230-231, affirmed 341 U. S. 494; *Carbo* v. *United States,* 9 Cir. (1963), 314 F. 2d 718, 737.

This trial was no exception. Repeatedly, during the presentation of the government's case, evidence of acts and statements by one or more of the alleged conspirators[1] was presented. Objections were made by all defendants not shown to have participated in such acts or statements. Upon the government's avowal that the tendered evidence would be "connected up" Judge Mercer reserved his ruling upon such objections. By the close of the government's case, there remained pending a great number of such objections upon which the court's ruling was reserved. Upon a motion by the government, Judge Mercer overruled all pending objections and admitted the evidence as to all of the defendants.

The majority of the court does not hold that that ruling was error, or that the trial judge failed to apply correct

1. The appellants and Joseph Lisciandrello who was not then on trial.

principles of law to his ruling. What they do conclude is that Judge Mercer may have conveyed to the jury the idea that the conspiracy was proved because he stated the reason for his ruling that the evidence was admitted as to all of the defendants.

One must read certain parts of the court's comments out of context to find any such implication therein. In pertinent part, Judge Mercer said:

> "From time to time objections have been made by defendants to testimony as to acts, conversations, and statements, had or made by one or more of the defendants, but out of the presence of the other defendants. Whenever such objections had been made, I reserved my ruling thereon, upon the government's avowal to connect up such testimony.
>
> "I now rule that the Government has sustained its avowed burden, and has shown to the satisfaction of the Court that a connection does exist between each such act, conversation and statement and the several defendants."

So stating, the court then overruled all pending objections and admitted the evidence as to all defendants.

It must be remembered that this jury, during days of trial proceedings, had heard the United States Attorney promise upon many, many occasions that the government would "connect up" testimony then being offered in evidence. In the light of that fact, it seems clear to me that that same jury, hearing the court's reference to "connected up" and "connection" in context, would understand that the comments related only to the question of the admissibility of the evidence, not to an ultimate issue of the case. Furthermore, this was not a one day trial. A narrative summary of the trial proceedings fills 377 printed pages of the appendix. Those pages reveal many, perhaps hundreds, of rulings by the court upon objections

to evidence of one type or another. Through days this jury had observed the court in its function of determining questions of admissibility of evidence. Thus, the ruling in question is not an isolated incident, but only one of the many rulings upon admissibility which this jury observed and heard. The majority of this court must be little impressed with the efficacy of the jury system in general, and with the intelligence of this jury in particular. For my part, I believe it degrades both to conclude as the majority does, that this jury would mistake the comment in question for the statement of an opinion upon the issue of guilt.

We do not even have to conclude that the comment was not erroneous. If it be assumed to be error, when the comment is viewed in the light of this record it was harmless error.

Judge Mercer's ruling upon the pending objections came at the close of the government's case in chief. Thereafter, the trial continued for several days before the evidence was closed. The extent of the time elapsed between the comment in question and the court's charge to the jury is suggested by the fact that a narrative summary of the evidence for the defendants and the rebuttal evidence by the government fills 138½ pages of the printed appendix. The probable effect of the comment upon the jury must be determined in the light of that fact, and, further, by viewing the comment in its proper context with the court's final charge to the jury.

This trial closed with a charge in detail stating the law which the jury would apply. The point is best illustrated by quoting, verbatim, pertinent parts of that charge.

After defining the crime of conspiracy in his charge, the trial judge instructed the jury, in pertinent part:

"If you find from the evidence beyond a reasonable

doubt that existence of the conspiracy charged in the indictment has been proved, and that during the existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy as charged, proof of the conspiracy offense charged is then complete; and it is complete as to every person found by you to have been knowingly and willfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

"A conspiracy is an agreement between two or more persons to violate a law of the United States.

"In this case, the defendants are charged with having agreed, that is to say conspired, to possess merchandise which had been stolen from interstate commerce, knowing the same to have been stolen from interstate commerce.

"Before you can find any defendant guilty of the offense charged in Count 1 of the indictment, you must first find, beyond a reasonable doubt, that such defendant entered into an agreement with another person; that that agreement addressed itself to the knowing possession of merchandise; that that merchandise was stolen from interstate commerce; and that such defendant knew it so to have been stolen at the time of entering into the agreement.

"If the Government has failed to prove any of the foregoing elements as to any defendant, then you must find such defendant as to whom the Government has failed to make such proof in a fashion that satisfies your mind beyond a reasonable doubt, not guilty.

"In your consideration of the evidence as to the offense of conspiracy charged, you should first determine whether or not the conspiracy existed as alleged in the indictment. If you conclude that such conspiracy did exist, you should next determine whether or not the accused knowingly and willfully became a member of the conspiracy. * * *

"Before a jury may find that a defendant, or any other person, has become a member of a conspiracy,

the evidence must show that the conspiracy was formed, and that the defendant, or other person who is claimed to have been a member, knowingly and willfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy. * * *

"In determining whether or not a defendant, or any other person, was a member of a conspiracy, the jury are not to consider what others may have said or done. That is to say, the membership of a defendant, or any other person in a conspiracy must be established by evidence as to his own conduct, what he himself said or did.

"If and when it appears from the evidence that a conspiracy existed, and that a defendant was one of the members, then the acts thereafter knowingly done, and the statements thereafter knowingly made, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of such conspiracy and in furtherance of an object or purpose of the conspiracy.

"Otherwise, any admission or incriminatory statement made outside of Court by one person may not be considered as evidence against any person who was not present and heard the statement given."

At another point in his charge, the court told the jury:

"If the accused be proved guilty beyond a reasonable doubt, say so. If not proved guilty beyond a reasonable doubt, say so.

"Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case.

"*Justice is done when the demands of the law are satisfied whenever a verdict is rendered in accordance with the proof made by all of the evidence to the satisfaction of the jury.* * * *

"The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, and all applicable presumptions stated in these instructions." (Emphasis added.)

Relative to the allocation of functions between the judge and the jury, the jury was told at the outset of the charge that it was the judge of the factual issues, of the credibility of the witnesses and the weight of the evidence. Finally, the charge was concluded with the following instructions:

"Ladies and gentlemen, at the beginning of this charge, I advised you that the Court determines what the law is, but that you, the jury, must determine the fact questions presented by the indictment and the defendants' pleas of not guilty. It is important that you accept the law as given to you by the Court in this charge. It is equally important that you decide all questions of fact upon your appraisal of the credibility of the witnesses and the weight to be accorded to the evidence and that your appraisal of the weight and credibility of the evidence be not influenced by any expression of opinion by the Court upon those matters.

"From time to time as this trial has progressed, it has been my duty as judge to rule upon objections and to decide questions related to the admissibility of evidence. In the course of the trial I have made certain statements and comments to counsel from time to time. No statement or comment by me in either of those instances was intended as an expression of an opinion by this court as to the credibility of any witness or as to the weight or credibility of the evidence. I impress upon you, ladies and gentlemen of the jury, that my comments and remarks made from time to time during the trial should be so understood by you; and that nothing said by me during the course of the trial should be taken or understood by you as an expression of an opinion by this court upon either the weight or the credibility of the evidence.

> "It is proper to add the caution that nothing said in these instructions—nothing in any form of verdict prepared for your convenience—is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury."

The imperative of the issues, as I see them, precludes the need for any apology for the extent of the foregoing quotations. The comment made by the District Judge in his ruling upon the pending objections must be weighed in the light of the whole record, and the charge to the jury in particular. That the majority of this court is unwilling to do. In no other way can I see any foundation for their conclusion that the Judge's statement that evidence was "connected up" burned so hotly in the consciousness of these jurors for days that they were precluded from understanding the court's charge at the close of the case. If that be true, these jurors must still be perplexed at the expenditure of long days hearing evidence related to issues as to which they had already been peremptorily instructed.

In his charge at the close of the evidence, Judge Mercer correctly advised the jury that the jury must decide whether a conspiracy had been proved and whether each of the defendants had joined in that conspiracy. The jury was further told that the acts and statements of others might not be considered as evidence in its determination whether each of the defendants was a member of any conspiracy by them found to exist. It was told, also, that acts and statements of a co-conspirator could be considered as evidence against a defendant who did not participate therein only if the jury was satisfied that a conspiracy had been proved and that such defendant was found to be a member thereof. The jury was told, explicitly, what was the evidence upon which its verdict must be found. Finally,

the District Judge told the jury that he had not by his charge to the jury or in any statement made by him during the course of the trial expressed any opinion upon the issues of fact, the weight of the evidence, or the credibility of the witnesses. One wonders what more a trial judge could have done. For my part, I am sufficiently naive to believe that these jurors were intelligent enough to understand the court's charge.

The zenith of appellate review of trial court decisions is reached when the reviewing court remains mindful of its own function and keeps ever in touch with reason and the realities of the world around it. One of those realities, and a recognized factor of judicial review, is the recognition of the frailities of man. An accused person is entitled to a fair trial, but not to a trial free of all error. *Fed. Rules of Crim. Procedure* 61; *Lutwak* v. *United States*, 344 U. S. 604 (1953). Were that not the rule, the judgment which could ever be affirmed would be well nigh impossible to achieve. I believe the majority of the court has now abolished that principle by reversing these judgments as to count I of this indictment upon an unsubstantial technicality viewed in an attitude separated from reality and oblivious to the context of this record.

The situation here is not at all comparable to that which existed in *United States* v. *Pronger*, 7 Cir. (1961), 287 F. 2d 498. In *Pronger*, the ruling upon admissibility and the comments found to be objectionable were made just prior to the court's charge to the jury. The sequence was such that those comments, for all practical purposes, were part of the charge. Under those circumstances, this court concluded that the effect of the Judge's comments was either to tell the jury that the conspiracy was proved, or to create a conflict in the charge itself which was inclined to confuse the jury.

By contrast, the comment here involved was made at the close of the government's case, with several days of trial, as summarized in almost 140 printed pages of narrative in the appendix, intervening between the comment itself and the final charge of the jury. The error, if any, was harmless, when viewed in its context in this record.

The majority opinion and decision reversing these judgments as to the substantive count of the indictment, count 2, is even more devoid of logic than is the majority opinion relative to count 1. The only reason assigned for reversal as to count 2 is that the difficulty of distinguishing the conspiracy evidence from the evidence relevant to count 2 rendered this lay jury unable to perform its function effectively. It is said that reversal must follow despite the fact that the evidence of record is sufficient to support the jury's verdict finding all of the defendants guilty of the offense charged in count 2.

To me the premises contain an inherent contradiction in the light of the record. This jury was not sent out to deliberate blindly without adequate instruction as to the law applicable to count 2. Count 2 charged the possession of liquor which had been stolen from an interstate shipment of freight in violation of 18 U. S. C. 659. In his charge, Judge Mercer defined the crime charged by an accurate summary of the statutory language. A paragraph of the charge defined possession. All essential elements of the crime were stated with particularity. The jury was advised that it must find that the government had proved each of those essential elements beyond a reasonable doubt before it could find any of the defendants guilty. The guilty knowledge required by the statute was fully and concisely defined. The jury was told that the plea of not guilty entered by each of the defendants placed the whole burden upon the government to prove them guilty beyond a reasonable doubt.

Finally, the jury was charged as follows:

> "It is your duty to give separate, personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants. Each defendant is entitled to have his case determined upon the evidence which has been admitted against him.
>
> "As you have noted, a separate crime or offense is charged against each of the defendants in each count of the indictment. Each offense and the evidence applicable thereto should be considered separately. The fact that you find some or all of the accused guilty or not guilty of the offenses charged should not control your verdict with respect to any other offense charged."

The charge given was complete and adequate. Upon this record, the jury can have ignored the conspiracy evidence and, yet have found beyond all reasonable doubt that the whiskey was stolen from an interstate shipment of freight, that each of the defendants had possession of all, or some, of the whiskey and that each of them knew that the whiskey had been stolen. I agree with the majority of the court that the evidence of record is sufficient to prove every essential element of the offense and the guilt of each of the defendants.

The jury system assumes that the persons selected after proper voir dire to serve as jurors are equipped with a sufficient degree of intelligence and literacy to understand and comprehend the English language. The system also presumes that jurors can take the law as given to them by the courts, apply the law to the evidence before them, and through that process, render their verdict. I am not willing to presume that any member of this jury was so lacking in intelligence and understanding that he or she

was unable to perform his duty. Without making such a presumption, I can find no support for the decision which the majority of this court has reached. I have a strong respect for the fundamental right of *every* accused person to a *fair* trial. I have an equally strong respect for the requirement of an orderly judicial process at both the trial court and appellate level. It is my opinion that we will further neither of those causes if these judgments are reversed. Fair trial must, of necessity, not mean "perfect" trial. It must successfully protect the rights of each individual accused, and, at the same time, protect society in general. Only thus will it preserve that high respect for law and order (which is sadly lacking in many areas of our national existence today) without which our form of life and government would soon perish.

In the absence of a single iota of proof to the contrary, I confidently believe this jury conscientiously performed the duty which they were empanelled and sworn to perform. Upon this record, each of the defendants has had a fair trial. The evidence of record fully supports the jury's verdict upon each count of the indictment and against each of the defendants. I cannot agree we should sift the record with a fine sieve to find a slight imperfection which could not have enured to the prejudice of any of the defendants for reversal of these judgments.

I would affirm the judgment upon each of these appeals.

IN THE UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

SEPTEMBER TERM, 1964 — SEPTEMBER SESSION, 1964

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 13915 *vs.*
JAMES ALLEGRETTI,
Defendant-Appellant.
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 13916 *vs.*
DAVID FALZONE,
Defendant-Appellant.
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 13917 *vs.*
FRANK LISCIANDRELLO,
Defendant-Appellant.
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 13918 *vs.*
LOUIS DARLAK,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Illinois, Northern Division.

December 22, 1964

Before HASTINGS, *Chief Judge*, and DUFFY, SCHNACKENBERG, KNOCH, CASTLE, KILEY and SWYGERT, *Circuit Judges*, en banc.

KNOCH, *Circuit Judge*. This matter came before the Court for reconsideration of its opinion previously rendered on April 22, 1964, ... F. 2d ....., in which the

nature of these proceedings is sufficiently set out to make repetition here unnecessary.

We have enjoyed the benefit of oral argument on such re-consideration together with the record and the briefs of counsel.

On reconsideration, this Court adopts the majority opinion handed down April 22, 1964, insofar as that opinion concluded that the evidence was sufficient to convict all the defendants herein on both counts of the indictment of (1) conspiracy to possess whiskey stolen from interstate commerce knowing such whiskey was stolen from interstate commerce, and (2) as to each defendant, of knowingly possessing the stolen whiskey.*

The trial was a long one. The conspiracy disclosed by the evidence was complicated. There was ample proof that the whiskey in question was stolen from an interstate shipment and abundant circumstantial evidence from which the jury could have concluded that each defendant must have known that the whiskey was stolen. The record shows that all of the defendants contributed to carrying out the object of the common conspiracy to possess the stolen whiskey. We deem it unnecessary to narrate the details of their activities. The record discloses that each engaged in one or more of such acts as storing the whiskey, directing or carrying out its distribution to various cafes, operating those cafes, stowing the whiskey there, and, in some cases, transferring it to other containers, raising funds to enable the conspiracy to continue after government agents had arrested one of the conspirators and after raids

* In the opinion of April 22, 1964, ... F. 2d ...., at page...., the Court stated: "In addition to the matters which we have already discussed, we deem it appropriate to state that there is sufficient evidence in the record to support the verdict as to each of the defendants. We reject defendants' contention to the contrary."

on some of the cafes involved, or making false exculpatory statements to the government agents.

There were sharp conflicts in the testimony and in numerous instances the jury would have to resolve issues of credibility. Viewed in the light most favorable to the government, the evidence supports the convictions. *Glasser v. U. S.*, 1942 315 U. S. 60, 80.

We do not adopt the majority opinion of April 22, 1964, with respect to the comments made by the Trial Judge in connection with his ruling on the admissibility of acts and statements of certain defendants in evidence against other defendants. It was on the basis of those comments that the majority, in the opinion of April 22, 1964, based its reversal of the convictions here appealed. We adopt instead the dissenting opinion to the effect that the statements of the Trial Judge did not constitute reversible error. ..... F. 2d ....., beginning at page .....

The defendants contend that statements made by alleged co-conspirator defendant David Falzone after his arrest were improperly admitted in evidence against other defendants. Their theory is that with the arrest of David Falzone, and the raids made the same day on some of the cafes where the stolen whiskey was stored, the conspiracy to possess liquor stolen from interstate commerce had come to rest. The evidence in the record supports a contrary holding that David Falzone's arrest did not terminate the conspiracy. Gerald Covelli testified to seeing some of the stolen whiskey in the possession of fellow conspirators two weeks after the earlier raids on some of the cafes. Even while in the custody of the Federal Bureau of Investigation, David Falzone was still issuing instructions for disposition of a part of the stolen liquor. Max Olshon testified that when released on bond, David Falzone stated that he was not unduly worried because Jimmy Allegretti would "straighten out the whole case." Gerald

Covelli testified that he and David Falzone then engaged in efforts to raise the money requested by James Allegretti for that purpose. There was evidence that David Falzone continued to participate in the conspiracy. *U. S. v. Agueci*, 2 Cir., 1962, 310 F. 2d 817, 839, and cases there cited. It was not necessary for the government to prove what, if anything, James Allegretti actually did to "straighten out the case," and continue the conspiracy. There was evidence that he asked for money and that, after David Falzone's arrest and release on bond, Falzone and Gerald Covelli did raise such sums which were turned over to James Allegretti to be used for that purpose.

David Falzone testified that he had seen Agent Weatherwax casually at a motel in April, 1962, had started a conversation with him, and that Agent Weatherwax, on hearing that Falzone proposed to testify at the trial, had said, "Don't be a fool, we will murder you on that stand." On cross-examination, the government attempted in vain to elicit certain testimony of further conversation with Agent Weatherwax respecting David Falzone's reasons for testifying as he did. Under the circumstances, it was proper rebuttal for Agent Weatherwax to testify to those further conversations and to incriminating admissions made by David Falzone in the course of such conversations.

We have scrutinized all the other examples of such evidence, the admission of which is characterized by appellants as reversible error, and must conclude that the position of the defense on this point is not well founded.

It is contended that post conspiracy declarations of one co-defendant, although admitted as to him alone (a matter on which the jury was instructed) were elicited with intent to prejudice the other defendants. Some of these declarations were made in the course of conversation between David Falzone, Gerald Covelli, and various government agents, including William D. Weatherwax, in the

U. S. Attorney's office. During cross-examination of Gerald Covelli reference was made to contradictions between his prior statements and his trial testimony. Gerald Covelli was explaining this on re-direct, pointing out that he had been corrected by David Falzone as to certain dates and places in the course of the above conversation. The corrections and attendant comments made by David Falzone, and described by Gerald Covelli, were incriminatory admissions of David Falzone and were clearly admitted only as evidence against Falzone. These admissions were corroborated by the testimony of a government agent present at the time who was properly permitted to testify to that effect and to the attendant circumstances, including the questions and comments in answer to which the incriminatory admissions were made.

The testimony of Gerald Covelli was a vital part of the government's case. The defense witness Robert Westerhausen testified that while he and Covelli were prisonmates at Leavenworth, Covelli told him in the course of many conversations that he was being paid to implicate his co-defendants, who in fact had nothing to do with the stolen liquor, in order to shield the real culprits.

The cross-examination of Mr. Westerhausen brought out the details of his prior long history of mental incapacity, although he had since been judicially determined as restored to sanity. On redirect, Mr Westerhausen testified to the nature and extent of his prior mental disease and its cure beginning in 1955 with the result, he stated, that his memory began to improve. On re-cross, Mr. Westerhausen said again that his memory had begun to improve about 1955. The government counsel then asked whether Mr. Westerhausen now recalled killing his stepmother. The Trial Judge sustained objections to this and instructed the jury:

> "The jury is instructed and admonished by the Court to pay no attention whatever to the last improper question by the Government."

It is contended that this admonition was insufficient and that a motion for mistrial should have been allowed. Although adjudged restored to sanity, the witness's interest, possible prejudices and accuracy of memory, and factors affecting these, were all proper subjects of cross-examination. The government was entitled to elicit pertinent circumstances affecting his credibility. *U. S.* v. *Lawinski*, 7 Cir., 1952, 195 F. 2d 1, 7. As the government argues, Mr. Westerhausen's mental history was extremely complex, *U. S.* v. *Westerhausen*, 7 Cir., 1960, 283 F. 2d 844, 848, including not only loss of memory, but auditory hallucinations. After carefully weighing the matter, we do not agree that this one question, which the Trial Judge held to be improper, and on which the jury were promptly instructed, required a mistrial. Similarly, we find no reversible error in the failure of the prosecution to follow up with affirmative proof its questions to which Mr. Westerhausen gave negative answers.

In several instances, the Trial Judge ordered parts of the testimony stricken although the defendants had moved not to strike but to declare a mistrial. A typical instance was Gerald Covelli's statement that there was a price on his head. The Trial Judge ordered the statement stricken and instructed the jury to disregard it. Gerald Covelli had been asked on cross-examination about having studied Spanish and Italian in Leavenworth and had denied that he proposed to go to Rio de Janeiro to take "off a diamond score." It was proper on redirect to cover the same subject matter On redirect, Covelli said he was studying those languages because he proposed ultimately to leave the country and live elsewhere. He then added, not responsively, "I could never live peacefully in this country, because there is a price on my head now." Later Robert Westerhausen testified that Gerald Covelli had admitted to him that he intended to go to Brazil to steal

diamonds and that he was studying Spanish for that purpose. We do not consider this, or the other similar actions by the Trial Judge, as bases for reversal.

It is further contended that the defendants were denied their rights under 18 U. S. C. § 3500 (Jencks Act) with respect to the witness Max Olshon. It is apparent from our own close study in camera of the documents in question, which included both direct statements of witnesses and reports of government agents, which the Trial Judge examined in camera, that he did not, as feared by defense counsel, limit the word "statements" as used in the statute to mean only such statements as the witness had himself set down on paper. We find no error in this regard. Max Olshon testified to a conversation with David Falzone on March 18, 1959. The prior statement of Max Olshon which was produced did not refer to this conversation. Objection was sustained to the question whether he had told the Grand Jury about it. The Trial Court denied a motion for production of the Grand Jury transcript of his testimony to ascertain whether he had or had not mentioned this conversation. No such particularized need was shown for such production as to outweigh the traditional maintenance of secrecy surrounding grand jury proceedings. It was not error to deny the motion. *U. S.* v. *Magin*, 7 Cir. 1960, 280 F. 2d 74, 79; *U. S.* v. *Nasser*, 7 Cir., 1962, 301 F. 2d 243, 245, and cases there cited.

We have given particularly close consideration to the assertion that cross-examination of government witnesses was unduly limited to the prejudice of the defendants. In every such instance cited by the defendants, the Trial Judge sustained objections to the questions as beyond the scope of the direct examination. The defendants concede the traditionally wide latitude given to a Trial Judge in controlling cross-examination, but argue that the principle has here been expanded to keep relevant facts from

the jury according possible collaboration between Lou Fushanis, one of his employees, and Gerald Covelli, sought to be introduced by way of cross-examination. Our study of the matter leads us to the opposite view that the Trial Judge did not abuse his authority in this respect. One of the explanations given for the effort to introduce the evidence sought to be elicited by way of cross-examination is that the defense could hardly be expected to call Gerald Covelli as its witness. The difficulties inherent in trial tactics cannot be permitted to dilute the authority of a Trial Judge to control the trial. We find no error here.

Contrary to defendant's contention, the Trial Judge did instruct the jury that to find defendants guilty they must find them to have known that the merchandise involved was stolen from interstate commerce. It was not necessary to give repetitious instructions tendered by the defense.

The Trial Court also instructed the jury regarding the definition of an accomplice and the caution to be exercised in weighing his evidence. Whether Lou Fushanis was or was not an accomplice or co-conspirator was an issue of fact which was presented to the jury by a conflict in the evidence. It was not error for the District Judge to refuse to underline the testimony of one of the witnesses and his inferences respecting this issue. If the jury concluded Lou Fushanis was an accomplice, then they had been told how to treat his testimony, and they had adequate instructions in interpreting that testimony with respect to the basic issues of the innocence or guilt of the defendants.

We have reviewed all other points raised by the defendants. After due consideration, we find that none operates to alter our conviction that the judgment of the District Court must be affirmed.

AFFIRMED.

SCHNACKENBERG, *Circuit Judge*, partly concurring and partly dissenting.

I approve and concur in Judge Knoch's opinion insofar as it is not inconsistent with the majority opinion of this court filed on April 22, 1964.

The comment of a judge who concurred is pertinent:

> "* * * And the court's statement that it was satisfied that a connection existed between the acts of the several defendants invited a substitution of the 'feeling of collective culpability for a finding of individual guilt.'"

I would reverse the district court in this case and remand it for a new trial.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois.

Thursday, January 21, 1965

Before

Hon. John S. Hastings, Chief Judge
Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

Nos. 13915, 13916, 13917, 13918

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
JAMES ALLEGRETTI, DAVID FALZONE, FRANK LISCIANDRELLO, LOUIS DARLAK,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Illinois, Northern Division.

IT IS HEREBY ORDERED by the Court sitting *en banc* that the petitions for rehearing filed in the above-captioned appeals be, and the same are hereby DENIED.

(Judge Schnackenberg voted to grant petitions for rehearing.)